

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Applications of Motorola, Inc.)
)
For Consent to Assign 800 MHz SMR Licenses)
To Nextel Communications, Inc.)

ORDER

Adopted: February 29, 2000

Released: March 1, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

1. This Order addresses a petition¹ filed by Clarks Electronics, *et al.* ("Petitioners"), requesting reconsideration of the Wireless Telecommunications Bureau's ("Bureau") grant of Motorola Inc.'s ("Motorola") applications to assign certain 800 MHz Specialized Mobile Radio ("SMR") licenses to Nextel Communications, Inc. ("Nextel").² For the reasons discussed below, we deny the Petitioners' request for reconsideration.

BACKGROUND

2. On December 9, 1994, Motorola filed applications seeking consent to assign to Nextel certain 800 MHz SMR licenses. The proposed assignment included the transfer of unconstructed authorizations. The Bureau sought comment on whether the proposed assignment was in the public interest and, after reviewing the record, concluded that the assignment would promote competition in the broader CMRS marketplace and was consistent with antitrust principles. The Bureau recognized that Section 90.609(b) of the Commission's rules³ precludes the transfer of unconstructed authorizations for a conventional or trunked radio system, but affirmed its policy that Section 90.609(b) does not apply to the transfer of unconstructed digital authorizations where the service contours of the unconstructed authorizations are entirely within the footprint⁴ of already constructed analog facilities.⁵ Motorola certified to the Bureau that all of its unconstructed digital station authorizations for which it sought assignment to Nextel were ancillary to its underlying constructed analog stations, and had service contours that fell within the footprint of its existing wide-area system.⁶ Accordingly, the Bureau granted

¹ Petition for Reconsideration filed by Clarks Electronics, Teton Communications, Inc., Radio Service Company, Zundel's Radio, Inc., Business Radio, Inc., Accu Comm, Inc., Earl's Distributing, Inc., and Earl's Wireless Communication (May 30, 1995).

² In the Matter of Applications of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications, Inc. 10 FCC Rcd 7783 (1995) ("Motorola Order").

³ 47 C.F.R. § 90.609(b).

⁴ We have defined the footprint of a system as the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by the applicant. *Motorola Order*, 10 FCC Rcd at 7787.

⁵ *Motorola Order*, 10 FCC Rcd at 7787.

⁶ See Letter from Robert L. Pettit to Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless

Motorola's request to assign to Nextel its constructed SMR licenses and unconstructed authorizations located within its existing footprint.⁷

3. On May 30, 1995, Petitioners filed a petition for reconsideration, arguing that (1) Bureau staff violated the Commission's *ex parte* rules in seeking additional information concerning Motorola's unconstructed sites in a restricted proceeding; (2) Motorola, in its supplemental information, failed to provide the requisite information to justify a waiver of Section 90.609(b) of the Commission's rules; and (3) the Bureau relied on an incorrect definition of the relevant product market. Petitioners request that the Bureau require Motorola to provide facts to support its request for assignment of unconstructed authorizations, provide Petitioners and other parties an opportunity to review these facts, and then assess Motorola's request in light of the facts and relevant law.

DISCUSSION

4. We disagree with Petitioners' claim that Bureau staff violated the agency's *ex parte* rules. Section 1.1208 of our rules⁸ prohibits *ex parte* presentations, to or from Commission staff, in restricted proceedings, unless the presentation is exempt under Section 1.1204(b).⁹ Pursuant to Section 1.1204(b)(7),¹⁰ in force at the time the application was filed, *ex parte* communications by the Commission or staff requesting information to clarify or adduce evidence or to resolve issues were exempt from the *ex parte* prohibition. The party responding to the request needed only file any oral or written response on the other parties to the proceeding.¹¹ Bureau staff contacted Motorola counsel solely for the purpose of obtaining additional information concerning the construction status of the SMR facilities included in Motorola's assignment application.¹² It is well settled that this type of inquiry fit squarely within Section 1.1204(b)(7).¹³ We therefore conclude that Bureau staff did not violate the agency's *ex parte* rules.

5. We disagree with Petitioners that Motorola's supplemental information was insufficient to permit transfer of Motorola's unconstructed authorizations to Nextel. Petitioners allege that Motorola, in effect, sought a waiver of Section 90.609(b), and that Motorola failed to meet its burden in justifying waiver of the rule. It is established Bureau policy that Section 90.609(b) does not apply to the transfer of underlying unconstructed SMR licenses with service contours that do not extend beyond the footprint of the already constructed analog facilities.¹⁴ Accordingly, waiver of Section 90.609(b) is not required in such instances. Motorola certified the following to the Bureau: (1) the relevant analog SMR licensed facilities were constructed and operational; (2) its digital and analog sites were co-located; and (3) no digital SMR stations included in the assignment had service contours outside of Motorola's wide-area

Telecommunications Bureau (March 31, 1995) ("Pettit Letter").

⁷ *Motorola Order*, 10 FCC Rcd at 7783, 7787.

⁸ 47 C.F.R. §1.1208.

⁹ 47 C.F.R. §1.1204.

¹⁰ 47 C.F.R. §1.1207(b)(7) (1995). This exemption has since been eliminated from the Commission's rules.

¹¹ *Id.*

¹² The record indicates that Motorola served a copy of the Pettit Letter on all parties to this proceeding.

¹³ *In Re Applications of Wendell & Associates*, 14 FCC Rcd 1671, ¶19 (1998); *In The Matter Of TCI Communications, Inc.*, 11 FCC Rcd 14,696, ¶¶ 13-16 (1996).

¹⁴ *In the Matter of Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp.*, 10 FCC Rcd 3361, 3366-3367 (1995) ("OneComm Order").

footprints.¹⁵ In addition, Motorola provided a copy of its request for waiver of Section 90.631(e) regarding its digital wide-area authorizations, wherein it explained that its digital stations were located only at existing SMR base stations used to develop Motorola's wide-area footprint.¹⁶ Importantly, neither Petitioners nor any other commenter in this proceeding have alleged that Motorola's unconstructed authorizations have service contours outside of Motorola's footprint.¹⁷ Based on the foregoing, there was sufficient evidence for the Bureau to find that Motorola's unconstructed digital authorizations were ancillary to underlying constructed analog stations, and had service contours wholly within the footprint of its existing analog facilities. We therefore affirm the Bureau's decision to grant Motorola's request to assign to Nextel unconstructed authorizations located within Motorola's existing footprint.

6. Finally, we disagree with Petitioners' argument that in approving the Nextel-Motorola transaction, the Bureau applied an incorrect definition of the relevant product market. In the original proceeding, several commenters argued that we should define the relevant product market as 800 MHz SMR service.¹⁸ We disagreed, concluding that the relevant product market was all terrestrial CMRS offerings, and adopted a definition of the product market that included cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, paging and PCS offerings.¹⁹ We determined that this market definition recognized the convergence of CMRS offerings and was consistent with the Commission's analysis of the CMRS market in the *CMRS Third Report and Order*. Since the *Motorola Order*, the Bureau has used a narrower market definition to evaluate mergers by SMR carriers, including several subsequent acquisitions by Nextel.²⁰ However, we do not believe that this evolution in our market analysis requires reconsideration of the Nextel-Motorola transaction. In the *Motorola Order*, we noted that the Department of Justice (DOJ) had approved the transaction using a significantly more restrictive product market definition than was used by the Bureau, and we found that DOJ's analysis supported our conclusion.²¹ Thus, we do not believe that using a narrower product market in our own analysis would have altered the result. Therefore, we deny the petition and affirm our prior decision.

7. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Clarks Electronics, *et al.* is DENIED.

¹⁵ Pettit Letter at 2, Attachment 1.

¹⁶ *Id.*, Attachment 2, pp. 10-11.

¹⁷ *Compare* OneComm Order, 10 FCC Rcd at 3361. OneComm sought consent to transfer control of certain 800 MHz SMR licenses to Nextel. The application included the transfer of unconstructed SMR licenses. Because several parties alleged that some of OneComm's unconstructed authorizations extended beyond OneComm's footprint, we conditioned our approval of the transfer on a showing by OneComm that the service contour for each unconstructed authorization did not extend beyond OneComm's existing footprint. *Id.* at 3367.

¹⁸ *Motorola Order*, 10 FCC Rcd at 7785-7786.

¹⁹ *Id.* at 7786.

²⁰ *See* In Re Applications of Wilmington Trust Company or Hughes Electronics Corporation, Assignors, and FCI 900, Inc. Assignee, For Consent to Assignment of 900 MHz Specialized Mobile Radio Licenses, DA 00-89 (Wireless Telecommunications Bureau, Jan. 14, 2000); In re Applications of Pittencrief Communications, Inc. and Nextel Communications, Inc. For Consent to Transfer Control of Pittencrief, 13 FCC Rcd 8935 (1997) (Bureau used interconnected mobile phone and dispatch as the relevant product markets). Notwithstanding, our current product market definition is still more expansive than the 800 MHz SMR definition.

²¹ *Motorola Order*, 10 FCC Rcd at 7787. DOJ defined the relevant product market as 800 MHz, 900 MHz and 220 MHz trunked SMR services.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Deputy Chief
Wireless Telecommunications Bureau